U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A37 310 392 - New York City Date: JAN 25 1996

In re: RAIMUNDO RODRIGUEZ-GONZALEZ

IN DEPORTATION PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Jorge Guttlein, Esquire
Aranda & Guttlein
291 Broadway, Suite 707
New York, New York 10007

CHARGE:

Order: Sec. 241(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1251(a)(2)(A)(iii)] - Convicted of aggravated felony

Sec. 241(a)(2)(B)(i), I&N Act [8 U.S.C. § 1251(a)(2)(B)(i)] - Convicted of controlled substance violation

APPLICATION: Reopening; reconsideration

The respondent's motion to the Board to reopen or reconsider our previous order dated June 6, 1995, is granted, and the record is remanded.

The record reflects that the respondent was ordered deported in absentia by the Immigration Judge on November 2, 1994. In a motion to reopen filed before the Immigration Judge, the respondent stated that he did not receive notice of the November 2nd hearing. The Immigration Judge denied the motion to reopen on January 19, 1995, noting that proper notice had been sent to the respondent at his known address, but that the certified letter was returned as unclaimed. 1/ The Immigration Judge further noted that the respondent did receive the subsequent order of deportation at the same address.

In his appeal to the Board, the respondent reiterates that he did not receive notice of the hearing, even though he did receive the subsequent order of deportation, and that his address has never changed. He could not explain why he did not receive the notice of hearing, other than to say that "there have been recent well-publicized problems with the U.S. Postal Service delivery of mail not only in the New York area, but across the country."

1/ The record contains a receipt indicating that the notice of hearing was sent to the respondent by certified mail on September 12, 1994, but the record does not contain the unclaimed returned notice.

On June 6, 1995, the Board dismissed the respondent's appeal. We ruled, in accordance with our recent decision in Matter of Grijalva, Interim Decision 3246 (BIA 1995), that the evidence in the record showing the notice of hearing was sent to the respondent by certified mail at his known address was sufficient to establish proper service. The presumption of proper service could be overcome only by the affirmative defense of improper delivery by the Postal Service, as evidenced by affidavits and other forms of evidence. The only evidence submitted by the respondent, an affidavit by his attorney stating that the respondent told him he did not receive notice and that there have been problems with the postal service, was not deemed sufficient to rebut the presumption of effective service.

In support of his present motion to reopen, the respondent has offered his personal affidavit and the affidavit of his building superintendent asserting that there have been many problems with mail delivery in his building due to broken mailboxes and indicating that there have been many complaints regarding mail delivery. The respondent further offered an affidavit from his attorney arguing in support of his motion. Finally, the respondent offered four letters from tenants in his building corroborating his claims regarding problems with the mailboxes and mail delivery in his building.

A motion to reopen must be supported by new or previously unavailable evidence. See 8 C.F.R. § 3.2. While the letters and affidavits offered by the respondent do not assert new or previously unavailable evidence, we will accept them for the following reasons, and will grant the motion. 2/

First, we note that the respondent's motion to reopen was first filed with the Immigration Judge on November 22, 1994, that is, prior to our April 28, 1995, precedent decision in Matter of Grijalva, supra, which set forth the requirements for prevailing

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2/ Although the respondent's motion is entitled "motion to reopen" or "reconsider," it is in reality a motion to reopen. A motion to reconsider "questions the Board's decision for alleged errors in appraising the facts and the law." 1 C. Gordon & S. Mailman, Immigration Law and Procedure § 3.05[7][a], at 3-61 (rev. ed. 1991). When we reconsider a decision, we are reexamining that decision in light of additional legal arguments, a change of law, or perhaps an argument or aspect of the case which was overlooked." Hurwitz, Motions Practice Before the Board of Immigration Appeals, 20 San Diego L. Rev. 79, 90 (1982) (footnotes omitted). See also Matter of Cerna, Interim Decision 3161 (BIA 1991); 8 C.F.R. §§ 103.5(a)(3) and 3.2. The respondent's motion is based upon factual allegations which were not previously presented to either the Immigration Judge or the Board. It is therefore a motion to reopen.

on a motion to reopen in absentia proceedings based on a claim of lack of notice of hearing. Indeed, the respondent in Grijalva had also presented evidence of improper delivery for the first time on appeal, and we acknowledged in our decision that his evidence was not new, but we nevertheless remanded under the particular circumstances of that case (including the absence of regulations or precedent regarding notice issues) to have the Immigration Judge consider the evidence in light of our new holding. We also find it appropriate to reopen proceedings in this case as our requirements for reopening had not been made clear when the respondent first filed his motion to reopen.

Second, we note that the respondent's new evidence comports with the requirements of Grijalva and are sufficient to warrant reopening. We held in Grijalva that

> where service of a notice of a deportation proceeding is sent by certified mail through the United States Postal Service and there is proof of attempted delivery and notification of certified mail, a strong presumption of effective service arises. There is a presumption that public officers, including Postal Service employees, properly discharge their duties. [cites omitted] A bald and unsupported denial of receipt of certified mail notices is not sufficient to support a motion to reopen to rescind an in absentia order under section 242B(c)(3)(A) or (B) of the Act.
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> This presumption of effective service may be overcome by the affirmative defense of nondelivery or improper delivery by the Postal Service. However, in order to support this affirmative defense, the respondent must present substantial and probative evidence such as documentary evidence from the Postal Service, third party affidavits, or other similar evidence demonstrating that there was improper delivery or that nondelivery was not due to the respondent's failure to provide an address where he could receive mail.

The respondent's affidavits and letters present strong evidence that the mailboxes in his building were regularly vandalized or broken and that mail was often missing during the time his notice of hearing was sent to him. This evidence raises an affirmative defense that the respondent may not have received his notice of hearing through no fault of his own. Accordingly, we will reopen proceedings and remand the record to the Immigration Judge. 3/

3/ While the motion has been pending at the Board, the respondent submitted a large number of documents, including copies of the contents of this record, which he received as a result of a

(Cont'd)

ORDER: The motion to reopen is granted, and the record is remanded to the Immigration Court for proceedings consistent with this decision.

FOR THE BOARD

Freedom of Information Request. From these documents, he ascertains that there is no proof in the record that notice of the hearing was actually mailed to him. Although the copies of the record received by the respondent through the FOIA request include a copy of the notice of hearing, he may not have received a copy of the attached postal receipt evidencing service by certified mail. The receipt is in the record though and clearly establishes proper service of the notice of hearing.